LEILA DULCIE ALLANAH LABROOY & ORS. v. S. M. SHARMA.

[Orig. Civ. Juris. (Hastings, J.) June 21, 1951]

[Ipoh — Civil Suit No. 321 of 1951]

Control of Rent Ordinance, 1948. ss. 8(1) and 11 — Rent Board's Order increasing the rent — Notice terminating the tenancy necessary.

An order of a Rent Board under section 8(1) of the Control of Rent Ordinance, 1948, if made in exercise of its apparent jurisdiction though plainly contrary to law is good unless appealed against under section 11 of the Ordinance.

When the Board has made an order fixing the rent of premises under the Ordinance, the order does not itself raise the rent. It is necessary for the landlord to give notice terminating the tenancy and giving the tenant an option to continue at the rent fixed by the Board.

Case referred to:—

(1) *Subramaniam v. Muthiah Chetty* (1933-34) F.M.S.L.R. 270; (1934) M.L.J. 222.

CIVIL SUIT.

Tan Cheng Hock for the plaintiffs.

J. D. M. Donnelly for the defendant.

The facts sufficiently appear from the judgment.

Cur. Adv. Vult.

Hastings, J. : —The plaintiffs are the landlord of house No. 12 Labrooy Road, Ipoh. The defendant was the tenant of the house from April 1st, 1946, until 31st July, 1950. The agreed rental of the house was $70 per month and the tenancy was terminable on a month's notice. The tenant continued to pay the rent until the end of the month of Febrary, 1948. On February 5th, 1948, he wrote to the landlord and asked him in pursuance of section 5(1) of Cap. 6 of 1948 (Control of Rent Ordinance) which had come into force on 31st January, 1948, in place of the 1940 Enactment, to specify the standard rent of the house, that is the rent as on 25th September, 1940. The reply was that it was $35 and the tenant was asked to withhold further payment of the rent until an order had been obtained from the Rent Board (see No. 7 in P. 1) to fix the rent. The defendant pleaded in paragraph 5 of his defence that he set off the excess payment of the rent against the rent payable after that date to the knowledge of the plaintiffs. The plaintiffs did not admit this and relied on the letter No. 7 in P. 1 in support of their view of the matter. I think the plaintiffs are right in that the landlord did not understand that the tenant was withholding the rent on the ground that he had paid too much but thought that it was done in consequence of No. 7 in P. 1. I do not think it is a matter of any importance. The defendant must have known that the plaintiffs would suppose he was acting on the invitation in that letter though he may well have intended to avail himself of the right to set off or recover back the rent he considered he had been overcharged.

The plaintiffs made an application to the Rent Board to fix the rent but no order was made on this application until June 14th, 1950, when the Board made an order fixing the rent of the house at $70 with effect from 1st March, 1948. I presume this date was chosen because the defendant had paid the rent up to the end of February, 1948, but I may observe in passing that whatever the effect of the order it would appear that the lawful rent for February, 1948, would remain at $35. There was no appeal from this order. In my opinion the question whether the Board had power to make a retrospective order was a question of law and an appeal would have lain under section 11 of the Control of Rent Ordinance.

The only other fact I think it necessary to mention before passing to the arguments adduced is that on the 25th July 1950 the defendant tendered to the plaintiffs the sum of $175 being as he stated the rent due from and including the months of March to July, 1950. The tender was not accepted. The defendant had previously on 7th March tendered $35 as rent for the month of February, 1950, which also had been refused. I shall refer to the figure of $175 later in this judgment.

When the case came on for hearing it was clear that there was no material question of fact in issue between the parties and the matter became an issue of law on admitted facts. It was agreed and stated in the arguments of counsel for the plaintiffs that there were two main questions. First, was the order of the Board a valid Order? Second, was it necessary that the plaintiffs after obtaining the order should give a notice to the defendant terminating the tenancy and offering a fresh tenancy at the rent fixed by the Board?

I cannot refrain from pointing out the curious method of both parties in the pleadings in this suit. The case for the plaintiffs as pleaded was that the defendant had agreed to rent this house for $70 — that he had not paid the rent for 29 months and that this sum was due to the plaintiffs. There is no mention in the plaint of the order of the Rent Board upon which his claim was in fact grounded. The defendant in his defence refers to this order but does not plead, which was one of the main points in his defence, that the order was as his counsel termed it a nullity. I should have thought that the proper defence to the plaint as drawn was a plea that the standard rent of

the house was $35, that this was the only lawful rent which the plaintiffs could claim, that the defendant had already overpaid the plaintiffs for that part of the tenancy preceding the month of March, 1948, and that the defendant claimed to set off the amount over paid against the lawful rent for the months claimed for. The plaintiffs would then have been forced to amend and disclose their real cause of action which they never did until they came to Court. The defendant could then have pleaded that the order was a nullity and as he did that the tenancy at $35 a month had never been terminated by notice.

As I have said, the plaintiffs' case was based really on the order of the Board. The contentions of Mr. Tan were that the Board has power to fix the rent, that there was no restriction placed by the Ordinance on that power and therefore that the order was good. I do not agree with this argument. In my opinion the order was one which the Board has no power no make and if there had been appeal against that order it must have been set aside. But Mr. Tan argued further that whether he was correct in that contention or not since there had been no appeal the order was a good order. I am of opinion that this contention is correct. Several cases were cited on each side but none of them except *Subramaniam v. Muthiah Chetty*[1] and the cases referred to in that case seem to me to be really in point. Mr. Donnelly's arguments are cogent to show that the order was bad in law but not that it was not binding until appealed against. In my view the order of an inferior Court is good unless that Court had no jurisdiction to hear the case at all. In this case it is clear that the Board had power to hear this application and to fix the rent of this house and I think that any error the Board may have made in arriving at its decision to fix the rent was a matter for appeal and does not render the order a nullity. This disposes of the first point.

The second point raised by the defence, and this was pleaded and dealt with by Mr. Tan in his opening address, was that the landlord had given no notice to the tenant terminating the tenancy and offering a new tenancy at the increased rent. There was no dispute that this had not been done. Mr. Donnelly contended that the order of the Board fixes the rent only and does not create a new tenancy at that rent. To do this it is necessary for the landlord to give the appropriate notice. In my opinion this contention is good. I do not think that Mr. Tan really contested it. His argument was that it was not necessary in this case because the rent was not raised. It was $70 before and $70 after the order. I cannot accept this argument. The lawful rent, and there cannot be any difference bettween the rent and the lawful rent, was $35. The Board fixed the rent at $70 and thereby gave the landlord the right to raise the rent. To raise the rent the landlord had to give notice and this he never did and therefore the rent remained, and for the purposes of this case remains, at $35 a month. The defendant succeeds on this point.

Mr. Tan made certain other submissions. He submitted, if I understand him rightly, that the standard rent did not bind the plaintiffs, that $70 was the lawful rent up to the 31st January, 1948, and that a landlord can make what agreement he chooses if the tenant takes over an empty house. I mention these submissions but in my opinion there is no substance in any of them. Under the Enactment in force before the present Ordinance the landlord could not raise the rent payable when that Enactment came into force.

It follows from the decision on this point that the lawful rent of this house was $35 a month during the whole period of its occupation by the defendant. It remains to apply this decision to the figures of the claim.

Mr. Tan had one other argument which affects this point. He pointed out that while the Enactment of 1940 gave the right to the tenant to deduct any rent overpaid from future rents (see section 5 (iii) of the Enactment) the Ordinance now in force does not. Section 3 (4) merely enacts that the tenant may recover from the landlord any excess paid. He argued that the defendant is bound to counterclaim in order to obtain this and that he had not done so and therefore the plaintiffs were entitled to judgment for the sum of $1,015 being rent for the months of March, 1948, to July, 1950, at $35 a month. Mr. Donnelly claimed that he could set off the amount overpaid from April, 1946, to February, 1948, being the sum of $805. It is another curious feature of the pleadings on this case that though the defendant pleads that he did in fact set off the amount against the rent there is in fact no plea of a set off in the defence or statement of the amount which he claims to set off. In my opinion it is clear that the defendant could claim to set off this amount. It is, in the wording of section 92 of the Civil Procedure Code, an ascertained sum legally recoverable by him from the plaintiff. In a case where all the rules of pleading have been disregarded by both parties I allow any amendment necessary for this.

I think, therefore, the defendant is entitled to set off the sum of $805 overpaid by him between April, 1946, and February, 1948, against the sum of $1,015 the rent for the months of March, 1948, to July, 1950. There leaves a sum of $210 for which there must be judgment for the plaintiffs.

I propose to hear argument as to costs.

Order accordingly.

HAJI OSMAN BIN ABU BAKAR v. SAIYED NOOR BIN SAIYED MOHAMED.

[Orig. Civil Juris. (Hastings, J.) June 21, 1951]

[Ipoh — Civil Suit No. 379 of 1950]

Land Code (Cap. 138) s. 85(ii) — Registration of transfer owing to the death of the transferor — Remedy.

When by reason of the provisions of section 85(ii) of the Land Code a transfer cannot be registered owing to the death of the transferor before presentment, the transferee is not entitled to an order for specific performance of the contract since this is no act remaining to be done on the part of the transferor. The transferee is entitled only to the return of the purchase price and is not entitled to call for a part transfer by the representative of the deceased.

Semble: The only duty on the part of a transferor who has performed the whole of the contract is not to hinder or prevent registration.

CIVIL SUIT.

K. C. Chan for the plaintiff.

J. D. M. Donnelly for the defendant.

The facts and arugments appear sufficiently from the judgment.

Cur. Adv. Vult.

Hastings, J. : — The facts of this case are that on the 25th of September, 1944, one Saiyed Mahamud bin Saiyed Pandak who died on 11th of July, 1949, sold a registered share in the land held under Perak Grant for Land No: 15596 to the plaintiff for the sum of $2,250. The purchase price was paid in Japanese currency, the transfer was executed by both parties before the Collector of Land Revenue at Kuala Kangsar and handed to the plaintiff by the transferor together with the title to the land. This title is still in the possession of the plaintiff. This transfer was not presented at the Land Office during the occupation period. It was not presented in fact until October 25th, 1949, that is to say, until after the death of the transferor. Whether it could have been presented during the Moratorium period depends on whether it was a dealing within the meaning of clause 8 of the Moratorium Proclamation. In my opinion it was not since this dealing had taken place during the occupation period. I am fortified in this view by the wording of section 24 of the Titles to Land (Occupation Period) Ordinance, No. 39 of 1949, which directs the Registrar to register documents executed during the occupation period which have been presented since the expiration of such period. If such documents could not be presented it is difficult to understand what this can apply to. I do not, however, regard this as a matter of any importance as the question for decision would arise if the transferor had died at any time subsequent to the execution of the transfer. The facts in this case together with the provisions of the Land Code call for a decision on a question of general importance in Registration Law.

By the provisions of section 85(ii) of the Land Code, Cap. 138,

> "The death of any person prior to the presentation of any instrument executed by him shall prevail so as to prohibit the registration of such instrument, and such instrument if registered shall be void."

I have searched the textbooks dealing with land registration under the *Torrens System,* namely, "Registration of Titles to Land throughout the Empire" by James Edward Hogg, the same author's "Deeds Registration in Australia", "The Australian Land Titles (*Torrens System*)" by Donald Kerr and "The Transfer of Land" by J. H. Dallas Wiseman, a book dealing with the laws of Victoria, and it is clear to me that this provision is something peculiar to the law of this country. The usual principle of Land Registration Law is that the death of a party to an instrument does not prevent the registration of that instrument. This is in accordance with the ordinary principle of Conveyancing Law. I do not know why this provision was introduced but since it is there it is necessary to give effect to it. Further, there was no such provision in the land legislation of this country prior to 1926 and it must be presumed that this change was intended to have some effect. If, as the plaintiff contends, the only result of this change in the law was to compel the transferee to bring a suit to acquire a new transfer which he could present for registration and so to place himself in the same position as he would have been in before the alteration of the law, it appears to be difficult to understand why this legislation should have enacted the change.

The plaintiff claims against the administrator of the transferor specific performance of the agreement of Septembr 25th, 1944, or in the alternative the return of the $2,250 paid. I shall deal with the latter claim later in this judgment. The stress of the plaintiff's claim was for specific performance. The counsel